‘The Convention at national level’ from Human Rights Information Bulletin

Caption: Article published in December 2000 in a special edition of the Human Rights Information Bulletin of the Council of Europe to mark the 50th anniversary of the European Convention on Human Rights. With the help of examples, the article illustrates the influence of case-law concerning the Convention in the different member States of the Council of Europe.

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The Convention at national level

The success of the European Convention on Human Rights is due largely to the control mechanism set up by it, which is unique in international law. This mechanism provides for two supervisory organs: the European Court of Human Rights, whose judgments are binding on states; and the Committee of Ministers, responsible for ensuring the execution of these judgments.

In accepting to be bound by the Court's judgments, states guarantee not only to take steps to redress violations suffered by individual victims, but also to adopt general measures intended to avoid the occurrence of violations similar to those found by the Court.

Such measures of a general character are of crucial importance for the maintenance and development of a minimum European standard of human rights. Their adoption involves an in-depth analysis of the root causes of the violation. Thus, the consequences of a judgment may involve changes in legislation, in the constitution or, more frequently, the recognition of new jurisprudence by the courts or changes in administrative practice on the part of the authorities. In carrying out its supervisory powers over the fifty years of the Convention's existence, the Committee of Ministers has endorsed some 350 measures of a general nature adopted by contracting states following decisions of the Convention organs. (Document H/Conf (2000) 7 contains a detailed analysis.)

For this Bulletin we approached a number of experts in the field – in particular the government agents – to select for us a few decisions of the Convention organs that have had especially important repercussions in their respective countries. The choice has been made according not only to objective criteria, such as the adoption of a general measure, but also to other factors, more difficult to assess, and for which the expert view is therefore all the more valuable. These secondary factors may include, for example, a judgment – sometimes concerning another state – which has had a high profile in the public opinion; one that has stimulated debate in the national or legal community; or one that has given rise to pressure towards a change in mentality.

The following analysis bears witness to the impact of the European Convention on Human Rights in the daily life of European citizens and to its continuing vitality.

Andorra

ECHR ratified 1996

Andorra, member state of the Council of Europe since 1994, has been involved in only a few cases before the European Court of Human Rights.

- But the Court played a key role at the time of the principality’s accession to the Council of Europe. In 1990 an application lodged against France and Spain (case of Drozd and Janousek) challenged a judicial procedure applied in Andorra. After lengthy proceedings the Court declared that it had no jurisdiction to judge the case. Nevertheless, the application enabled the Council of Europe to consider circumstances specific to Andorra, and helped in speeding up the accession procedure when, in 1993, the principality acquired full sovereignty by adopting the first Constitution of its history.

- Another case is worthy of remark, that of Millan i Tornes. In 1998 the first section of the European Court of Human Rights declared admissible this application, dealing with the refusal by the Andorran public prosecutor to submit to the Constitutional Court an *empara* appeal; only the public prosecutor was able to refer a case to the Constitutional Court. The decision was not open to appeal in criminal cases, and implied that the public prosecutor was both judge and party. On 22 April 1999 the *Consell General* (Andorran parliament) approved the Qualified Act modifying the Qualified Act concerning the Constitutional Court, which provides for direct access to this court. This recent act applies to persons who have already been refused access. The case of Millan i Tornes ended with a friendly settlement; and the judgment of the European Court of Human Rights led to a revision of the law.

In this way Court plays an important role in the progressive integration of Andorra into the European legal area.

Austria

ECHR ratified 1958

The influence of the Convention on the Austrian legal order is most impressive. Numerous improvements such as in the field of criminal procedure or the establishment of Independent Administrative Senates as an additional instance in administrative procedures are examples of changes in legislation as a result of proceedings before the Strasbourg organs. The European Court of Human Rights has further contributed to clarifying content and scope of the fundamental rights and freedoms contained in the European Convention, which under Austrian law is part of the Constitution.

In this regard, two aspects of Article 10 of the Convention may be cited for having given rise recurrently to decisions of the Court in the last decade.

- Of continuing importance is the Strasbourg jurisdiction that began with Lingens (1986) and Oberschlick (1993). Regarding the restrictions on the freedom of expression by Austrian courts based on proceedings for infringements of Article 111 of the Austrian Criminal Code (a person making defamatory statements through the media incurs criminal liability unless he proves that it is true), the Court stated, among other things, that only a pressing social need and the strict application of the principle of proportionality justify a restriction of the freedom of expression. With respect to politicians or the government, the limits of permitted criticism are drawn broader than with respect to private individuals.

- A second aspect of Article 10, namely the freedom to impart information and ideas, had also a major implication in the Austrian national sphere: the judgment in Informationsverein Lentia and Others (1993) played a decisive role in the lifting of the Austrian Broadcasting Corporation’s monopoly. Considering the Austrian system of licensing broadcasting enterprises, the Court defined the extent of permitted interference prescribed by law regarding the freedom of the media. According to the Court, the margin of appreciation of the State Party in this respect goes “hand in hand with European supervision”, which checks whether the measures taken are “necessary in a democratic society”. The Austrian system was considered incompatible with Article 10 of the Convention and consequently amended.

Belgium

ECHR ratified 1955

Several judgments of the Court have necessitated a substantial revision of the law, and new changes are being examined.

- The judgment in the case of Marckx (13 June 1979) concluded that there had been a violation of Article 8 and Articles 8 and 14 taken together with respect to illegitimate and legitimate children on three counts: the manner of establishing affiliation, the extent of the child’s family relationships and the inheritance rights of the child and of the mother.

- In the case of Moustaquim (judgment of 18 February 1991) the Court found a violation of the right to respect for the applicant’s private and family life. The case dealt with an order to deport a delinquent alien.

- In the case of Bouamar (judgment of 29 February 1988), which called into question successive orders to place a delinquent minor in a remand prison, the Court decided, in particular, on the “lawfulness” of deprivation of liberty within the meaning of Article 5 para. 1, on the limits of its powers of supervision concerning the interpretation and application of domestic law of the State by national authorities, on the lawfulness of placement orders, on the notion of *court* and on whether the remedies available satisfied the

conditions in Article 5 para. 4.

- The cases of Borgers (judgment of 30 October 1991) and Vermeulen (judgment of 20 February 1996) were referred to the Court over a similar issue, that of the role of the *Ministère public* before the Court of Cassation and its implications for the independence and impartiality of the Court and its prosecuting authorities, in both criminal and civil proceedings.

- The judgment in the case of two journalists, De Haes and Gijsels (24 February 1997), concerned the interpretation of Article 10 of the Convention and the principle of equality of arms (Article 6 para. 1 of the Convention). The case is significant because it deals with the role of the press in a democratic society. On the alleged violation of Article 10, the Court concluded that it had not been shown that the interference with the applicants' exercise of their freedom of expression was "necessary in a democratic society". And on Article 6 para. 1 the judgment defines the notion of equality of arms and concludes that there had been a violation.

- The application in the case of Aerts (judgment of 30 July 1998) questioned the legal aid entitlement procedure before the Court of Cassation relating to the right of access to a court as embodied in Article 6 para. 1. The Court also found that there had been a breach of Article 5 para. 1, since the applicant's detention on remand and delays in transferring him to a Social Protection Centre, regarded as an appropriate therapeutic institution, had rendered his detention unlawful considering the purpose of the detention order.

- The case of Van Geyseghem (judgment of 21 January 1999) raised the question of the right of the accused, who had not wished to avail herself of her right to attend, to be represented by a lawyer in criminal proceedings, as Belgian law made it compulsory for an accused to attend the trial. The Court concluded that there had been a violation of Article 6 para. 1 taken together with Article 6 para. 3 (c) of the Convention.

Bulgaria

ECHR ratified 1992

The Bulgarian State introduced measures to ensure the compliance of Bulgarian legislation with the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms well before the deposit of its application for membership of the Council of Europe.

- During the period preceding the judgment of the Court in the case of Assenov v. Bulgaria (28 October 1998), opinions regarding the prosecutor's functions differed, several jurists considering the prosecutor as an "officer authorised by law to exercise judicial power", while others considered that prosecutors were not sufficiently independent or impartial for the purposes of Article 5 para. 3.

The judgment of the Court brought an end to this divergence. The Bulgarian legal community came over the majority opinion that Bulgarian law does not comply with the requirements of the European Convention of Human Rights. Legislators, jurists and Bulgarian society are convinced that it was important not to put off bringing Bulgarian legislation into line with European law. The amendments to the Code of Criminal Procedure entered into force on 1 January 2000.

Croatia

ECHR ratified 1997

Under the Croatian Constitution (Article 134), the Convention, after being ratified and published, became a part of the internal legal order with legal force superior to ordinary laws. It is binding on all state authorities – legislative, executive and judicial. This binding force extends to the case-law of supervisory organs of the European Convention on Human Rights.

- The primacy of the Convention is seen in three ways:

– All laws must be interpreted in accordance with the Convention. The legislators do not intentionally pass laws contrary to the Convention. This basic principle is applied by all bodies responsible for interpreting the law, primarily courts.

– The Convention is considered a *lex specialis*, which gives it priority in application.

– The Convention may not be abrogated by any legal rule of national law.

The implementation of the Convention in Croatia has already had an impact in the national legal order. Article 6 para. 1 of the Convention guarantees the right to a fair and public trial within a reasonable time. The new Constitutional Law on the Constitutional Court of the Republic of Croatia (*Official Gazette*, No. 99/1999) allows citizens to lodge a constitutional complaint if a decision on a matter before the competent body is not made within a reasonable time. For example, the Constitutional Court held in a certain case that the competent municipality court should give judgement within the shortest possible time-limit and no later than one year from the date of the Constitutional Court's decision.

Cyprus

ECHR ratified 1962

- The Modinos case (1993) concerned an applicant, a homosexual involved in a sexual relationship with another male adult, who complained that his right to respect for private life under Article 8 of the Convention was being interfered with, through the existence of provisions in the Cyprus Criminal Code which could be invoked to institute criminal proceedings against him relating to homosexual conduct in private involving consenting male adults. The Court considered that the existence itself in the statute-book of Cyprus of the prohibition of homosexual conduct in private between consenting adults continuously and directly affected applicant's private life, despite the fact that in practice, since 1981, following the Court's judgment in the case of Dudgeon v. the United Kingdom (1981), no criminal prosecutions involving such conduct had actually been instituted or allowed to be instituted by the Attorney-General of Cyprus who had competence in the matter, as the authority invested with powers over the initiation of criminal prosecutions.

Following the judgment the Government of Cyprus, which had previously been unwilling to introduce amending legislation concerning homosexuality, irrespective of the fact that the law was not actually being enforced, proceeded to table legislation in Parliament, abolishing the offending provisions of the Criminal Code, so that homosexual conduct in private between consenting male adults no longer constitutes a criminal offence under Cyprus law.

- The case of Mavronichis v. Cyprus (1998) concerned a finding by the Court of a violation of Article 6 para. 1 of the Convention. A period of more than four years and two months had elapsed, during which appeal proceedings, lodged by the applicant with the Supreme Court of Cyprus concerning a first instance judgment in civil proceedings, had remained dormant. During that time no steps had been taken by the registry of the Supreme Court to process the appeal proceedings (for example, procedural steps to list the case for hearing or to deal with interlocutory notions). The Court considered that this was a particularly significant period of inactivity, and held that the volume of work with which the Supreme Court had to contend at the relevant period did not constitute an excuse for excessive delay, bearing in mind that Article 6 para. 1 imposed a duty on Contracting States to organise their judicial system in such a way that their courts could meet its requirement to hear cases within a reasonable time.

In the light of the Court's judgment, the Supreme Court of Cyprus has actively addressed the problem of delays in civil and administrative justice through a series of legislative amendments aimed at expediting the administration of justice and containing the backlog of cases, such as, for example, by reforming and simplifying procedural rules in administrative cases, extending the competence of single judges in civil jurisdiction, and gradually developing a system for the administration of Courts intended to facilitate the monitoring of civil and criminal cases and automating the Courts' functions.

Czech Republic

ECHR ratified 1992

The Czech Republic is one of the two states that inherited the rights and obligations of the former Czech and Slovak Federal Republic, which ratified the Convention on 18 March 1992. Under Article 10 of the Constitution of the Czech Republic, which entered into force on 1 January 1993, the Convention applies immediately and prevails over national domestic law.

- The first judgment of the European Court of Human Rights concerning the Czech Republic is dated 9 November 1999 (case of Špaček). The applicant company alleged a violation of its rights to the enjoyment of its property on the grounds that it was subjected to an additional tax based on administrative provisions that had not been published in the *Official Gazette*. The information concerning this judgment was widely published in the Czech media and the judgment was commented on by all national legal institutions. Following the judgment, supervision by the Strasbourg institutions of the implementation of human rights has become part of the daily life of Czech citizens.

- The final judgment in the case of Krčmář and Others, dated 3 March 2000, strengthened considerably the awareness of an effective European supervision of this respect for human rights, as it concerned the right to a fair trial. This fundamental judgment has also been a factor in awareness-raising, in that the Constitutional Court itself can be subjected to European supervision. Concerning recent judgments relating to different elements and aspects of fair trial and detention on remand, the problems found by the Court are subjected to a national examination. There is a clear trend towards taking into consideration the existing case-law of the Court, even in the application and interpretation of domestic law by State institutions. Government bills are examined more and more frequently in the light of the Convention's requirements: for instance, the recent law on the exercise of custodial sentence, in force since January 2000, shows a considerable concern for the respect of the requirements of the Convention in this field.

The Government of the Czech Republic has taken several important legislative and practical measures at national level in order to improve interministerial co-ordination and citizens' access to relevant information regarding applications before the Court, in particular, in the context of the entry into force of Protocol No. 11, as well as in the context of initial judgments and decisions of the Court. The Committee of Ministers is closely interested in this matter and wishes to be regularly informed on the state of applications lodged against the Czech Republic. Moreover, it attaches great attention to the execution of judgments in compliance with the requirements of the Court.

Denmark

ECHR ratified 1953

The significance in Denmark of the Convention can barely be overestimated. Its provisions and the case-law of the Court are – extensively and increasingly – invoked before and applied by the Danish courts and administrative authorities. The Convention and the case-law of the Court also play a significant role when new legislation is being prepared.

Four times the Court has found Denmark to be in violation of its obligations under the Convention. Three of these judgments have had a significant impact in the country.

- In the case of Hauschildt (judgment of 24 May 1989) the Court found that the many repeated decisions to place or keep the applicant in detention or remand made by the same judge who eventually decided the question of guilt might justify fears as to the impartiality of the judge in question. This was especially so when the decisions were based on a provision in the Danish Administration of Justice Act which required that the judge should satisfy himself that there is a "particularly confirmed suspicion". Accordingly, the Court held that having regard to the specific circumstances of the case there had been a breach of Article 6

para. 1. Even though the judgment did not question the Danish legislation in the area, it was decided to amend the Administration of Justice Act in order to ensure that no question should arise as to the objective impartiality of the judge. The amendment was extended beyond what was required from the judgment itself – also due to the fact that the Danish Supreme Court shortly after the judgment of the Court applied what was considered a somewhat dynamic interpretation of the case expanding its area of application even further. The Hauschildt case has increased even further public interest in the question of the independence and impartiality of the Danish judges.

- In the Jersild case (judgment of 23 September 1994) the issue in question was how to strike a fair balance between the right of the press to impart information and the protection of the rights of others – in this case particularly those included in the International Convention on the Elimination of All Forms of Racial Discrimination. The applicant, a journalist, had been convicted for having aided and abetted the dissemination of racist remarks when broadcasting an interview in a news programme. Even though the Court appreciated the vital importance of combating racial discrimination, it held that Article 10 had been violated. The Court stated that news reporting based on interviews was one of the most important means for the press to play its role of "public watchdog". Only where particularly strong reasons prevailed should the punishment of a journalist for broadcasting interviews be contemplated. The Jersild case has later been applied directly by Danish courts of law in their interpretation of Danish law and has been a contributory factor to an increased respect for the freedom of speech of the press.

- The case of A and Others (judgment of 8 February 1996) dealt with the right to a hearing within a reasonable time in relation to compensation proceedings brought by haemophiliacs who had been infected with HIV through blood transfusions. The Court held that even though the applicants had been a contributory factor to the length of the proceedings, the Danish courts were obliged to ensure that the case progressed in compliance with the requirements under Article 6 para. 1. Against this background, the Court found that the competent authorities had not acted with the exceptional diligence required in disputes of this character. The judgment led to an amendment of the Danish Administration of Justice Act aimed at streamlining the procedure in civil litigation and at strengthening judges' ability to control the proceedings. Furthermore, the case has drawn considerable attention to the length of proceedings of the Danish courts and an increasing awareness among judges of their independent responsibility in relation to the length of the proceedings.

Estonia

ECHR ratified 1996

The European Court of Human Rights has so far not passed any judgment concerning Estonia. There have, however, been some admissibility decisions which have been of importance.

- The first set of decisions concerns Article 6 and the system of the Appeals Application Panel of the Supreme Court. The Supreme Court has to grant a leave to appeal against the judgment of the Court of Appeal. The Commission found that Article 6 of the Convention was not applicable to those proceedings (Oll, Appl. No. 35541/97).

- The second set of decisions concerns Article 1 of Protocol No. 1 to the Convention and the reservation made by Estonia concerning the non-applicability of the provisions of Article 1 of Protocol No. 1 to the Convention. The Commission and the Court have found that the reservation was valid and compatible with the provisions of the Convention (Elias, Appl. No. 41456/98; Shestjorkin, Appl. No. 49450/99).

Finland

ECHR ratified 1990

In the Z v. Finland judgment (25 February 1997) the Court gave general guidelines on the **disclosure of personal data**. The Court held that the disclosure by the Court of Appeal of the applicant's identity and

medical condition without her consent for use in criminal proceedings against her husband constituted a breach of Article 8. The applicant and her husband were both infected with the human immunodeficiency virus (HIV). The Court ruled, however, that the orders requiring the applicant's medical advisers to give evidence did not constitute a violation of Article 8 nor did the seizure of the applicant's medical records nor their inclusion in the investigation file.

The national courts ordered that the full reasoning and the documents in the case be kept confidential for only ten years. The European Court held that the court order would, if implemented, constitute a violation of Article 8. Thus, at the request of the Ministry for Foreign Affairs, the Chancellor of Justice requested the revision of the impugned decision. Referring to the judgment the Supreme Court extended the period during which the trial records are to be kept confidential to 40 years.

France

ECHR ratified 1974

Since 1990 some fifteen legislative texts have been passed following a judgment of the Court in order to bring the French legislation into line with the Convention. Of these reforms, two deserve a particular attention.

- On several occasions the European Court of Human Rights has ruled on whether the practice of telephone tapping is compatible with the requirements of Article 8 of the Convention. It rendered, in particular, two judgments concerning France, on 24 April 1990, in the cases of Kruslin and Huvig.

The Court asserted that, even though it appears that the interception of communications is necessary to prevent criminal offences, as well as for the maintenance of order and for the protection of national security, the law must afford sufficient adequate safeguards against the possible abuses of such practices, which may jeopardise the respect for private life as embodied in Article 8 of the Convention. In both French judgments, the Court laid down a list of non-exhaustive regulations which should form part of legislation governing methods of interception of communications in order for that law to afford "adequate safeguards against various possible abuses".

As the requirements set out by the Court were not satisfied by any provision of French law at that time, the Government put before Parliament Law No. 91-646 of 10 July 1991 on the confidentiality of correspondence entrusted to the telecommunications service.

This law, which strictly complies with the Convention, lays down two essential principles: in the first place, only public authorities are allowed to breach the secrecy of correspondence entrusted to the telecommunications service; in the second place, public authorities can only carry out interception of telephone conversations in matters, restrictively provided for by law, connected with the condition of "necessity in a democratic society". Lastly, this law defines, in conformity with both principles, conditions in which the judicial authority, in the one hand, and the Governmental authority, on the other hand, may carry out interception of telephone conversations. The 1991 act, revised twice since its adoption, is still in force.

- In a judgment of 14 December 1999 given in the case of Khalfaoui, the European Court of Human Rights found that the procedure provided for in Article 583 of the Code of Criminal Procedure undermined the right of access to court as embodied in Article 6 par. 1 of the Convention.

French legislation provided that "Convicted persons sentenced to a term of more than one year's imprisonment who fail to surrender to custody, without obtaining from the court which sentenced them an exemption (with a surety if so ordered), forfeit their right to appeal to the Court of Cassation".

Following this judgment the French Government introduced in the text of Law No. 2000-516 of 15 June 2000 reinforcing the protection afforded by the presumption of innocence and victims' rights an Article 121

which abrogates, in particular, Article 583 of the Code of Criminal Procedure. From now on an applicant sentenced to a term of more than one year's imprisonment who lodges an appeal is exempted from the requirement to surrender to custody prior to the examination of his appeal by the assize chamber of the Court of Cassation.

Georgia

ECHR ratified 1999

In order to become a member of the Council of Europe, Georgia agreed to fulfil a list of commitments elaborated by the Parliamentary Assembly and then confirmed by the Committee of Ministers.

It took less than a month for Georgia to fulfil one of the major commitments on the list, that of ratifying the European Convention on Human Rights.

Georgia made no reservations or territorial declarations. The reservations were not made because it is understood that the whole operation of the Convention provisions and consequently the European Court's involvement will be of paramount importance in the process of building a truly democratic society where the rights and freedoms of each person are respected.

The situation was a bit more complicated with relation to the Article 56 of the Convention. Considering the present situation in Georgia, it was argued that the experience of Moldova, which made a declaration concerning the territory that is not under its *de facto* control, is the most appropriate way to follow in relation to the Abkhazia and Tskhinvali regions. However, another approach was chosen, according to which no territorial declaration was made, firstly because there is a strong belief that in the near future effective control over these territories will be restored; and secondly, because there was an assumption that the European Court of Human Rights will take into account the factual circumstances as well as the international case-law on these matters.

So far there have been no decisions of the European Court of Human Rights on the applications lodged concerning Georgia, but undoubtedly the first judgment will have a substantial impact upon the country.

Germany

ECHR ratified 1952

- Firstly, in the case of Luedicke, Belkacem and Koç (judgment of 28 November 1978), the applicants claimed to be victims of a violation of their rights as defined in Article 6 (3) (e) of the Convention in that they had been ordered by the German courts to bear interpretation costs at their trial.

Ruling that the right embodied in Article 6 included the right to be granted benefit of free interpretation without being ordered afterwards to pay the costs of this assistance if found guilty, the Court also said that this guarantee should not be restricted to interpretation afforded during debates but extended to the translation and interpretation of all documents and oral declarations necessary for the understanding of the procedure by the accused.

As a consequence of this judgment, an Act of 18 August 1980 provided for the German revenue department to bear the costs of interpretation when the accused does not understand German.

- The case of Öztürk (judgment of 21 February 1984) also concerned the right to have the benefit of free interpretation assistance, this time in a procedure concerning a traffic violation.

In its judgment the Court referred to its decision in the case of Luedicke, Belkacem and Koç and found that there had been a breach of Article 6 (3) (e) of the Convention. This decision led to a revision of the relevant judicial procedure in non-criminal offences.

- In the Schmidt case (18 July 1994) the applicant argued a breach of the constitutional principle of equality before the law in that the *Land* of Baden-Württemberg imposed obligatory fire-brigade duty on men only, which could be replaced by a compensatory financial contribution.

In its judgment the Court ruled that Article 14 read in conjunction with Article 4 (3) (d) applied to the case and concluded that it had been violated. Following the judgment the *Land* of Baden- Württemberg and the *Länder* of Lower Saxony have abandoned the imposition of a fire-service levy. Generally, the Federal Constitutional Court had held that the imposition of a fire-service duty was in breach of the Constitution, stating that similar regulations contained in acts passed by Federal *Länder* were null and void and incompatible with the Basic Law.

Hungary

ECHR ratified 1992

A careful screening process (*compatibility exercise*) was carried out between the signing of the Convention in 1992 and its ratification. Both before and after this, a number of new acts were adopted in order to bring Hungarian legislation in line with the requirements of the Convention.

The Convention had a great impact on Hungarian law also through the jurisprudence of the Constitutional Court, which has referred to the Strasbourg case-law in a great number of its decisions concerning freedom of expression, freedom of association, freedom of religion and the right to private or family life, as well as various aspects of the right to a fair trial.

Convention case-law may also be invoked in individual cases before civil or criminal courts. A case particularly interesting to mention in this context raised essentially the same issues as the case of Hoffmann v. Austria which was referred to by the Supreme Court supporting its decision. (The applicant had complained that the custody of her children was awarded to her ex-husband rather than to herself because she was a Jehovah’s Witness.)

- Most recently, the judgment in the case of Pélissier and Sassi v. France served as an incentive for modifying the Code of Criminal Procedure so as to include stronger guarantees for the rights of defence in case of recharacterisation of a criminal charge by the trial court.

Iceland

ECHR ratified 1953

The impact of the European Convention on Human Rights on Icelandic legislation and public awareness of human rights in general has been significant, particularly the last ten years.

For a long time Iceland had an unblemished record with the Court and Commission of Human Rights, and only a few applications were filed against Iceland in the first thirty years.

- One of the most important cases which have been brought to the Strasbourg organs is undoubtly the case of Jón Kristinsson v. Iceland. In 1987, the European Commission of Human Rights examined the case of an Icelandic citizen who had been convicted of a traffic violation in a district court. On appeal, the Supreme Court of Iceland upheld the conviction. In accordance with the procedure in effect at the time, his case had been heard and adjudicated by the town magistrate’s deputy. This deputy was responsible to the town magistrate who was also in charge of the police. An application was lodged with the Commission alleging that the case of the accused had not been heard by an impartial judge in the lower instance, thus violating the Convention.

In 1989 the Commission concluded that the judicial organisation then in effect violated Article 6 of the

Convention. At that time, preparations were already started for radical changes in the organisation of the judiciary. In 1989 a new Act was adopted providing for the complete separation of judicial and executive branches. The main object of these changes was to make the courts as independent as possible and not dependent on the administrative branch. Besides judicial authority being transferred from the district magistrates to independent district courts, even stronger measures were taken to ensure the independence and impartiality of judges.

The case of Jón Kristinsson was referred to the European Court of Human Rights, and at the end of 1989 a settlement was reached between Iceland and the applicant. There is no doubt that the decision to reorganise the court system and to make a general revision on legal procedures before the courts owe a great deal to the European Convention on Human Rights and the case of Jón Kristinsson.

- Relatively few cases against Iceland have been declared admissible before the European Commission and the Court (10-20 cases), but they have gained great public attention and debate. In two judgments in cases against Iceland the European Court of Human Rights has found the Icelandic Government to be in breach of the Convention. These cases were Thorgeir Thorgeirson (1992), concerning the freedom of expression protected by Article 10, and Sigurður Sigurjónsson (1993), concerning the negative freedom of association and Article 11 of the Convention. Both these cases lead to changes in legislation.

In 1994 the European Convention on Human Rights was the first international human rights instrument incorporated into Icelandic law, by Act No. 62/1944. Its provisions can be invoked in court as domestic legislation.

In 1995 various amendments were made to the human rights provisions of the Constitution. The amendments provided extensive changes and additions to the human rights provisions which had become somewhat outdated in various ways, having remained almost totally unchanged since 1874. The new human rights provisions reflect to a great extent the provisions of the European Convention on Human Rights.

Ireland

ECHR ratified 1953

The Convention has probably had the greatest impact in Ireland in the areas of family and private life, and within these areas on intimate relationships outside marriage. Successful applications against Ireland have required legislative and constitutional change.

- Following the Court’s judgment of 18 December 1986 in Johnston and Others, legislation was passed to bring the legal status of children born outside marriage more or less into line with that of children born to a married couple (Status of Children Act, 1987).

- Following its judgment of 26 October 1988 in Norris, homosexual activity between adult men was decriminalised (Criminal Law (Sexual Offences) Act, 1993).

- Following its judgment of 26 May 1994 in Keegan, provisions were enacted affording an unmarried father the opportunity to be consulted before his child is placed for adoption and the right to be heard by the Adoption Board and to oppose the adoption if he wishes (Adoption Act, 1998).

- Moreover, following the Court’s judgment of 29 October 1992 in Open Door and Dublin Well Woman, the Constitution was amended to allow women to have access to information in Ireland about abortion services in other countries; and the conditions under which such information might be made available were subsequently laid down in the Regulation of Information (Services outside the State for Termination of Pregnancies) Act, 1995.

Family rights are recognised and protected by the Irish Constitution, but these are rights of the family based on marriage. Under the Convention, as interpreted by the Court, family life is based on the existence of a *de*

facto relationship and the intention of the persons concerned.

In so interpreting the Convention, the Court has responded to social change and has, through its judgments, contributed significantly to the legal recognition in Ireland of such change.

Italy

ECHR ratified 1955

To aid both in the fight against terrorism and in the repression of Mafia-type criminal activities, the Italian legislature has twice taken steps to reinforce the law. In 1965 (Law No. 575) and in 1975 (Law No. 152), prevention measures provided for by Law No. 1423 of 27 December 1956 were amended, strengthening their severity. These measures included the possibility of making a **compulsory residence order**.

The 1975 law stated in particular that persons under a compulsory residence order could, for "reasons of particular gravity", following a lawful decision of the president of the court with jurisdiction to order the preventive measure, be placed in detention during the proceedings, to prevent their avoiding the final decision by absconding before its execution.

In a judgment of 22 February 1989, the Court, pronouncing in plenary session on the application of Salvatore Ciulla, lodged in 1984, noted that there had been a violation of Article 5 para. 1, among other articles of the Convention, in the application of this case. It considered that, because of the autonomous nature of the preventive measures concerning the system of criminal prevention of offences (see paragraphs 39 and 40 of the judgment, as well as the cited judgments), as well as the conditions of their application (for the purpose of which simple evidence could be sufficient) and the procedure (to which the Court did not considered it applied) are concerned, this atypical form of detention on remand could not be justified.

As a result of the application, and before the judgment was delivered, the Italian legislature had already taken measures (Article 7 of Act No. 327 of 1988). The detention provided for under the earlier law was abolished and replaced by a compulsory residence order valid for the time it took for the decision to become definitive.

General measures which could have been necessary for the execution of the judgment of the European Court of Human Rights had therefore already been adopted while the case was before the Court – as indeed the Court itself stated and, moreover, used in its line of reasoning (para. 41 of the judgment) to confirm its finding of violation.

Lithuania

ECHR ratified 1995

The first and – so far – the only judgment of the European Court of Human Rights in which Lithuania has been found responsible for breaches of the Convention is the case of Jėčius v. Lithuania (judgment of 31 July 2000), which found violations relating to different aspects of the **right to liberty and security** (Article 5).

The Court found violations of Article 5 para. 1 in that the detention of the applicant had been effected in accordance with the domestic law, but the law itself was not "lawful" within the meaning and for the purposes of Article 5 of the Convention. Preventive detention not relating to the suspicion of the person having already committed an offence was held not to be permitted under Article 5 para. 1; and continuing detention on remand not covered by a detention order, but justified by reference to "having access to the case-file" and to the fact that the case had been transferred to the trial court, was held to be in breach of Article 5 para. 1 because of the lack of precision and foreseeability of the domestic procedure.

A violation of Article 5 para. 4 was found partly because of the existence of the statutory bar on appealing at

the trial court against the orders relating to detention.

The very fact that this case (and a few other applications of similar nature) challenging the compatibility of Lithuanian law with the Convention standards was brought to Strasbourg and examined there accelerated the process of amending provisions regulating detention, the result being that at the time of the adoption of the judgment none of the defective provisions the application of which had led to violations of Article 5 in the case of Jėčius v. Lithuania was any longer in force.

It remains to be seen whether the findings of violations in the same case caused by not applying domestic law properly (i.e. violation of Article 5 para. 3 as to the length of the detention on remand due to failure of the authorities to adduce relevant and sufficient reasons to justify continuing detention, and violation of Article 5 para. 4 due to failure of the court in its decisions authorising the remand in custody to refer to the applicant's grievances about the unlawfulness of his detention) will lead to greater care on the part of domestic authorities in applying national law.

Malta

ECHR ratified 1967

Three recent cases dealt with by the European Court of Human Rights which have had a particularly significant impact in Malta were the Aquilina and Wiffin cases (judgments of 29 April 1999) and Ben Nasr Sabeur Ben Ali (judgment of 29 June 2000). These decisions concerned **bail** and the **legality of an arrest**.

The European Court of Human Rights considered that the appearance before a magistrate in those particular cases was not capable of ensuring respect for Article 5 para. 3 of the Convention because the magistrate had no power to review automatically the merits of the detention. Moreover, the Court examined the domestic court's case-law concerning habeas corpus and the usual duration of domestic court proceedings on applications under Article 5 para. 4. The Court considered that it had not been shown that during this detention on remand the applicant had at his disposal a remedy for challenging the lawfulness of his detention.

Following these cases, amendments have been proposed to the Criminal Code to bring it in line with the European Convention. For the purpose of bail, in certain cases, the person brought before the Court after arrest had to file an application which had to be sent to the Attorney General for his views as to whether the person should be granted bail or not. This would no longer be required under the new amendments. Moreover, the magistrate would be able to decide on the legality of arrest immediately.

Moldova

ECHR ratified 1997

On joining the Council of Europe, Moldova accepted a series of commitments, including the ratification of the European Convention on Human Rights. The ratification of this instrument was made possible thanks to a government programme, carried out by a working group and organised in co-operation with the Council of Europe, aimed at adjusting existing Moldovan law to the requirements set out in the Convention. This process is continuing.

Within this programme several modifications were made to domestic legislation in order to bring it into line with the European Convention on Human Rights and the case-law of the European Court of Human Rights.

It is particularly worth mentioning the introduction of the principle of adversarial examination in civil and criminal cases, the issuing of arrest warrants through judges (and no longer through prosecutors), access by a detained person to a lawyer within twenty-four hours, the introduction of the right to be assisted by an official defence counsel, the introduction of the perpetual right to get satisfaction from courts against breaches of human rights and liberties, the abolition of death penalty, and the right to compensation in case

of judicial error.

Netherlands

ECHR ratified 1954

Dutch criminal proceedings differ from those in common law countries in that most of the evidence is gathered not in open court but in the course of the preliminary inquiry conducted under the auspices of the investigating judge. Ever greater brutality among criminals has increased witnesses' fear of reprisals if they testify against a suspect. In the Netherlands this led in the 1980s to an increase in the use of **anonymous witness** statements in criminal proceedings.

- In its judgment of 20 November 1989 in the case of Kostovski v. the Netherlands, the European Court of Human Rights curbed this trend for the first time. The unbridled use of anonymous witness statements to convict someone was deemed incompatible with the right to a fair trial as enshrined in Article 6 of the European Convention on Human Rights.

The Court's ruling generated heated debate in the Dutch legal world concerning the question of whether evidence deriving from an anonymous source could still be used at all, and if so under what conditions. The use of anonymous witness statements was regulated in due course by successive Supreme Court judgments, sometimes referred to as the Kostovski case-law, together with a new statutory provision. In particular, the rules provided that no one could be convicted exclusively on the basis of such evidence, and assigned a key role to the investigating judge.

- However, the judgment of 23 April 1997 in the case of Van Mechelen and Others v. the Netherlands showed that the new situation could still lead to a violation of the Convention. The Court ruled that the procedures in use insufficiently compensated the defence for the handicaps to which it was subject. As the Netherlands does not possess, to date, any statutory scope for reopening criminal proceedings after a judgment handed down by the Strasbourg Court, the effect of this judgment was that the four applicants, who had been sentenced to long terms of imprisonment for armed robbery, were immediately released by the Minister of Justice and awarded financial compensation by the Court. This understandably provoked a public outcry in the Netherlands.

Just how sensitive is the issue of anonymous witnessesis clear from the fact that not long ago an anonymous witness submitted an application against the Netherlands, alleging that the State had afforded him insufficient protection from the threats issuing from the suspect against whom he had testified.

- By judgment of 4 July 2000 in the recent case of Kok v. the Netherlands, the Court rejected an application concerning the use of anonymous witness statements on the grounds that it was manifestly ill-founded. Hopefully this is a sign that the right balance has gradually been struck between the diverse interests of suspects, witnesses, the public prosecutor and the sound dispensation of justice in general.

Norway

ECHR ratified 1952

On 23 June 2000 the Norwegian Supreme Court – sitting in plenary session – handed down a landmark decision in a case concerning the Norwegian system for **administrative sanctions** against tax evasion. The plaintiff in this case was a Norwegian businessman. Investigation by the tax authorities and the police disclosed both fraud against his customers and serious tax evasion during 1985, 1986, 1987 and 1988. He was convicted in the criminal courts for these crimes in 1991. Subsequently the tax authorities found that he had acted willfully or with gross negligence, and thus decided to impose upon him an increased tax supplement amounting to 60% of the tax evaded. Under Norwegian law this is a purely administrative sanction, which may, however, be subject to review by the courts.

The Supreme Court held that the imposition of an increased tax supplement amounted to a “criminal charge” under Article 6 of the Convention. The Supreme Court based this decision on the case-law of the European Court of Human Rights, especially the Court’s judgments in the cases of Bendenoun v. France and A.P., M.P., and T.P. v. Switzerland. Article 6 being applicable, the Supreme Court held that the case (as regards 1987 and 1988) had not been decided within a reasonable time as required by the Convention. In order to afford redress to the businessman, the Supreme Court annulled the tax supplement for 1987 and reduced the tax supplement for 1988 to 30%.

The Supreme Court also discussed the allegation that the imposition of the increased tax supplement violated the principle of *ne bis in idem*, as prohibited by Article 4 of Protocol No. 7 to the Convention. Under the concrete circumstances of this case the Supreme Court was not under an obligation to decide upon this matter.

The judgment of the Supreme Court has put the focus on the use of administrative sanctions, and the protection offered by the Convention to persons who are suspected of e.g. tax evasion. In addition the judgment has sparked off a new interest for the principle of *ne bis in idem*, both in cases of tax evasion and other cases like the withdrawal of a driving licence following a criminal conviction for drunk driving.

San Marino

ECHR ratified 1989

There have been no instances in San Marino of changes in legislation being carried out following a Court judgment. This is because the Great General Council (parliament) has in every case adopted new laws on the basis of applications made to the European Court of Human Rights without waiting for the judgment.

- The case of Buscarini and Others (judgment of 18 February 1999) concerned an alleged violation of Article 9 of the Convention, which protects the freedom of conscience and religion. At its origin was the obligation for new members of parliament to take oath on a copy of the Gospels. The San Marino Government argued that the oath had no religious value, but represented the historical and cultural heritage owed to the Christian traditions which were the basis of the identity and the very existence of the republic (founded early in the 4th century). But the Court’s finding of a violation did not require any “general measures” to implement the judgment: Law No. 115 of 29 October 1993, adopted before the application to the European Commission of Human Rights, allowed for members of parliament to take the oath on their honour.

- Before the reform of the judicial system (Law of 18 October 1992) it was alleged that the dual role of investigating judge and trial judge, vested in the same person, would lead to violations of Article 6 para. 1. After examination of the Court’s case-law, Law No 20 of 24 February 2000 was introduced, guaranteeing the public nature of appeal hearings.

Slovenia

ECHR ratified 1994

In December 1991 Slovenia adopted the Constitution of the Republic of Slovenia, which was set out following the example of other modern European constitutions, accurately defining human rights and enabling their direct protection.

After ratification the ECHR became a part of internal state law, which means that it is directly used and hierarchically placed above the laws and provisions thereof. The legal position of the ECHR did not raise much attention at its adoption, because other international conventions were already used in the same way. The content of the adopted Convention was not a novelty since the protection of the human rights and fundamental freedoms was already regulated by the conventions, which were adopted under the protection of the United Nations, and especially by the new Constitution.

But an abstract legal text requires an explanation. With the use of legislation in the field of human rights, which entails a number of legal standards, mere reference to the text of the Constitution and conventions is not enough. Therefore the case-law, set out by the Commission and the Court of Human Rights in Strasbourg, was very welcome and it is of utmost importance. Access to this kind of literature was difficult at the beginning, but today everybody knows the *Short Guide to the European Convention on Human Rights* in its Slovene translation. In some journals it is possible to find also the translations of individual decisions of courts, and access to the literature in English and French is available through the Information and Documentation Centre on the Council of Europe – The National and University Library in Ljubljana.

It is possible to establish that the Slovene courts deciding on legal remedies often decide on cases referring to Article 6 para.1 of the Convention. Where the parties assert essential breaches of the procedural provisions, the courts use mostly the provisions from Slovene procedural laws and abundant case-law, of the Slovene courts. When it is necessary to interpret laws in connection with various conventions and the Constitution, Slovene courts rely upon the established European case-law. This is what the court did, for example, in deciding upon parental responsibilities such as residence and access to children in civil (and not administrative) proceedings, because the law that regulates this field is not reconciled yet with the Constitution and international conventions adopted by the Republic of Slovenia.

In criminal or civil proceedings the courts often decide also in cases of conflict between the right to privacy and the right to freedom of expression and to impart information. In such cases the national courts can only rely on the established case-law of the Commission and Court of Human Rights. They use it, for example, to decide on the boundaries between privacy and public life, on public figures and interference in their privacy, on the meaning of “necessary in a democratic society”, on the different purposes of interference (e.g. in literary or artistic works or commercial advertising) and similar.

“Classical” decisions in this field, referred to by domestic and foreign authors, include Dudgeon v. the United Kingdom, Lingens v. Austria, Barthold v. Denmark; and also more recent ones, such as Fressoz and Roire v. France and Bladet Tromsø and Stensaas v. Norway.

Spain

ECHR ratified 1979

- The case of Barberà, Messegué and Jabardo (judgment of 6 December 1988) was of great importance, and necessitated legislative changes to improve procedures, as well as the reopening and overturning of the domestic proceedings following the Court’s judgment.

- The second significant judgment is the Court’s decision of 28 October 1999 in the case of De la Cierva Osorio de Moscoso, Fernández de Córdoba, Roca y Fernández Miranda and O’Neill Castrillo, which was declared inadmissible. The case concerned the question of male precedence in the handing down of titles of nobility.

In 1988 a decision was made that had a bearing on the rights of the accused in criminal cases – a subject that the drafters of the Convention almost certainly had in mind. In 1999, the question decided by the Court dealt with the inheritance of aristocratic titles – and it is very unlikely that there was any intention, when the Convention was drawn up, of protecting noble titles and their transfer.

As we commemorate the 50th anniversary of the Convention, these two examples show how the protection of human rights has evolved.

Sweden

ECHR ratified 1952

The Court's interpretation of the Convention over the last two decades has shown that Swedish legislation and its application have not been altogether consistent with Sweden's obligations under the Convention.

- The first case against Sweden really to attract the attention, not only of public officials but also of the public at large, to the Convention was the case of Sporrong and Lönnroth (judgments of 23 September 1982 and 18 December 1984). The case concerned the effects of long-term expropriation permits and prohibitions on construction with regard to property in Stockholm as a result of townplanning measures. The owners had lacked an opportunity under domestic law to seek a reduction of the time-limits for the permits and to claim compensation. The Court concluded that there had been a violation of the owners' right to the peaceful enjoyment of their possessions (Article 1 of Protocol No. 1). A violation of Article 6 was also found since the property owners were unable to have access to a tribunal in order to have their dispute with the City of Stockholm determined. The applicants were awarded substantial compensation by the Court. At the time of the first judgment, the domestic legislation had already been partly modified. Further legislative amendments were a consequence of the Court's finding of violations in that case.

- While the case of Sporrong and Lönnroth became an eye-opener in respect of the Convention system as such, a series of other cases which followed showed that there existed a deficiency of a more general nature in domestic Swedish legislation (cf. the Pudas judgment of 27 October 1987 (traffic permit), the Tre Traktörer judgment of 7 July 1989 (permit to serve alcoholic beverages), the Skärby judgment of 28 June 1990 (building permit), etc.). The Court's interpretation of the formula "civil rights and obligations" in Article 6 made clear that there was a lack of access to court in different fields where administrative decisions were decisive for the civil rights and obligations of individuals. Already in 1988 the Riksdag adopted the Act on Judicial Review of Certain Administrative Decisions. The Act mandated the Supreme Administrative Court to review not only administrative decisions made by different authorities but also those made by the Government in administrative matters directly concerning individuals. Access to court has since then been included in many different parts of the domestic legislation when it comes to provisions concerning appeal.

- A further example of the impact of the Convention on Swedish legislation is the fact that a new system concerning provisional detention and detention on remand pending trial in criminal cases was introduced in 1988. The new system meant that courts had to be in operation and judges on duty also on weekends. This was a result of the Court's finding in the case of McGoff (judgment of 26 October 1984). The case dealt with the question of how long a person could be provisionally detained on remand without court review. The Court had come to the conclusion that the time-period that McGoff had been detained before having been brought before a judge had not been in accordance with Article 5 para. 3 since he had not been brought "promptly" before the judge.

Switzerland

ECHR ratified 1974

The Court's judgment of 29 April 1988 in the **Belilos** case has had considerable repercussions in Swiss law.

The case is, however, trivial in its origins. The applicant had been fined 200 Swiss francs by the city police for having participated in an unauthorised demonstration. Her appeals against the fine did not involve a legal review of the facts, the courts concerned being permitted only to review the law.

In its judgment, the Court held to be invalid Switzerland's interpretive declaration concerning Article 6 para. 1 placing a reservation on such a situation (a reservation considered to be vague and lacking a brief explanation of the laws it was intended to cover). The Court held that the applicant had been deprived of a full and complete review of the merits of the case against her. Article 6 para. 1 had therefore been violated.

Extrapolating from this case-law, the Swiss Federal Tribunal held to be invalid all the interpretive reservations and declarations made by Switzerland concerning Article 6. Hundreds of provisions at federal, cantonal and local levels had therefore to be changed to allow all charges in criminal cases and all disputes concerning civil rights and obligations to be subject to a judicial review on the facts of the case as well as

the law.

Turkey

ECHR ratified 1954

In the cases of Incal and Çiraklar (judgments of 9 June and 28 October 1998) the European Court of Human Rights found that the applicants had not had a **fair trial** within the meaning of Article 6 of the Convention, in that the State Security Courts included a regular military officer among the judges.

The participation of serving military officers as magistrates in State Security Courts was covered by Article 143 of the Turkish Constitution, the provisions of which were invoked by the law setting up these courts. Accordingly, in order to implement the judgments of the European Court of Human Rights, the Turkish Government submitted to the Grand Assembly the necessary constitutional and legislative amendments, which were adopted respectively on 18 June 1999 (Act No. 4388) and 22 June 1999 (Act No. 4390). The publication of these laws in the *Official Gazette* on the day of their adoption meant that military judges and procurators ceased to have any function within the State Security Courts as from that date.