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Human Rights and the Rule of Law

Geert Corstens



European University Institute
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Distinguished Lecture

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the Presidents of the Supreme Judicial Courts of the European Union

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Abstract

This paper examines the role of the Courts in ensuring that human rights that exist on paper are 'practical and effective' in application. The author conducts this examination by considering the important role of the rule of law in the application of human rights. The author argues that the written law, which enshrines human rights, only becomes legally enforceable if there exists a functioning and proper government structure. That structure includes an independent and impartial judiciary which is capable of ensuring proper implementation of the rule of law. In a democracy governed by the rule of law, the government is also bound by the law and that law contains safeguards protecting everyone's individual freedoms. The author sets out five developments which explain the great increase in the importance of fundamental rights in recent years - proliferation, horizontal effect, internationalisation and a broadening of perspective. The final part of the paper takes two topics which emanate from consideration of the first of these five developments, proliferation. The first topic is the scope for a national approach versus European uniformity and the second is the difference between destructive and constructive criticism of the case-law of the European Court of Human Rights. This paper concludes by again underlining the important role of the rule of law in ensuring government accountability and the implementation of human rights and argues that because of the acceptance by national Courts of the aforementioned developments, those Courts are better prepared to interpret human rights in the modern world.

Keywords

Human Rights; Rule of Law; Role of the Courts; Separation of powers; European Convention on Human Rights.

Introduction

I am delighted to be invited here today. The reputation of the European University Institute and its Centre for judicial cooperation and the enthusiasm and dedication of professor Cafaggi convinced me to accept this invitation despite my busy schedule.

In the field discussed in this lecture – Human Rights and the Rule of Law – there can be a vast difference between theory and reality. In this area in particular, rights that exist on paper must also be ‘practical and effective’, as required by the European Court of Human Rights (ECtHR).

Justice Antonin Scalia vividly illustrated this point when he appeared before the United States Senate Judiciary Committee two years ago.

‘Every banana republic has a Bill of Rights’ is what Justice Scalia said. And he continued: ‘The bill of rights of the former evil empire, the Union of Soviet Socialist Republics, was much better than ours. I mean it literally.’ ‘[But] the constitution of the Soviet Union did not prevent the centralisation of power in one person or in one party. And when that happens the game is over.’

The words of the law, the words enshrining human rights in the law, acquire practical meaning and become legally enforceable only if there is a proper government structure, including an independent judiciary, to ensure the rule of law.

Today I shall focus on the role of the courts, however the courts are but a single player in how human rights acquire their practical significance. They are a player that can achieve little alone. To some extent the courts are dependent on society’s willingness to take note of their rulings and act upon them. Education, scholarship, documentation and practice should converge, as they do in the European University Institute, to make human rights ‘practical and effective’.

I shall start by sketching the significance of human rights and the rule of law and the connection between them. Then I propose to examine some topical themes in the light of the case law.

I. What does the rule of law mean?

To answer this question I might draw on the findings of the ‘Report on the Rule of Law’ published in 2011 by the European Commission for Democracy through Law (the Venice Commission). This report aimed to reconcile the notions of ‘Rule of Law’, ‘Rechtsstaat’ and ‘État de droit’. The purpose was to identify an adequate definition of the rule of law, a definition that could help courts and international organisations in interpreting and applying this fundamental value and principle. I will not repeat the Commission’s findings at length. It is enough to say that the elements on which consensus was found included the following: legal certainty, access to justice before independent and impartial courts, and respect for human rights.

The close relationship between the rule of law and human rights is also reflected in the results of the expert meeting of the United Nations Commission on Human Rights. It is all the more appropriate to refer to the Commission because this year is the 65th anniversary of the United Nations Universal Declaration of Human Rights.

I am extremely happy to be able to say that the Declaration is not planning to retire!

Indeed, it is more alive than ever and has been an inspiration for many other important human rights instruments, such as the European Convention on Human Rights, which I will discuss later. Still, for the purposes of this lecture the definition of the rule of law on the homepage of the World

Justice Project, an American initiative supported by the Neukom and the Gates Foundations, will suffice.

That definition is: ‘The rule of law is a system in which no one, including government, is above the law; where laws protect fundamental rights; and where justice is accessible to all.’ It adds that ‘The rule of law is the underlying framework of rules and rights that make prosperous and fair societies possible.’ I share that belief.

In a democracy governed by the rule of law, government too is bound by the law, which contains safeguards protecting everyone’s individual freedom, including that of minorities.

Under the rule of law, government encourages respect for the law among citizens and discourages them from taking the law into their own hands.

Under the rule of law, the law is applied equally to everyone. As the late Lord Bingham, former Lord Chief Justice of England and Wales, remarked in his excellent book on this subject:

‘If you maltreat a penguin in the London Zoo, you do not escape prosecution because you are the Archbishop of Canterbury.’

Under the rule of law, the separation of the legislative, executive and in any event the judicial branches of government guarantees the freedom of each and every one of us. Citizens must be able to enforce their rights where necessary, and access to an independent and competent court is crucial in this respect. It must not be possible to dismiss judges if they hand down a ruling which displeases the executive.

What the separation of powers means and why it is so important becomes painfully obvious in situations where it is absent. In concrete terms, that means no freedom of expression, no right to a fair trial, no right to privacy in your own home. Or at least, only to the extent that those in power allow their people such rights. That is not only morally wrong, it would also seem impossible to sustain in the long run. European history has shown that and the Arab spring would appear to confirm it.

In Arab countries too, people demanded the departure of repressive regimes, and more political freedom, democracy and human rights. They called for measures to tackle corruption and combat unemployment and food shortages. To achieve those aims, there is no better model than a democracy governed by the rule of law. A stable democracy governed by the rule of law creates the best climate for economic development as well. Who would want to do business with a country where agreements cannot be enforced and the only thing that counts in the end is a ruler who is unconstrained by checks and balances?

II. The rule of law has to grow and take root: the rule of law in stages

In theory, given all the knowledge, experience and best practices we have at our disposal, a democratic state governed by the rule of law could be created in an hour. In practice, however, even today, such a state needs decades to grow and take root.

In his most recent book, Justice Stephen Breyer describes meeting a chief justice in an African country who asked him: ‘Why do Americans do what the courts say?’ She wondered what the secret was. Breyer answered that there was no secret, that ‘following the law is a matter of custom, of habit, of widely shared understandings as to how those in government and members of the public should [...] act when faced with a court decision they strongly dislike.’ That habit and widely shared understanding cannot be achieved without a struggle; it is a long, gradual development based on experience. If society does not accept the rulings of the courts, it will ultimately descend into chaos.

It takes time, integrity and an unceasing commitment to building a democracy governed by the rule of law where the law is more than words on paper, where the actions of government are genuinely bound by the rule of law and where citizens have effective access to the courts.

This is a shared responsibility for those in authority within each of the three branches of government. Let me give you a good example, from several weeks ago, of how this responsibility takes shape in practice. The Dutch Supreme Court had ruled against the State of the Netherlands in the Srebrenica cases.

Immediately afterwards, Prime Minister Mark Rutte announced that the government would comply with the Supreme Court's judgment, adding: 'as is proper in a state governed by the rule of law'.

He is right that it is proper and we are not surprised that he should say so. However, if we look some distance beyond our own borders or if we spend a little time studying history, we realise how privileged we are to be alive here and now. To be living in a country where the rule of law is deeply rooted and where human rights are respected. A country where women enjoy equal rights. A country where gay people can be themselves.

III. The Judge as a Craftsman without a Programme

I will now turn to the role of judges in a state governed by the rule of law. The task of the courts is to apply the law. During the Enlightenment it was widely believed that the judge was just the mouth of the law. Now we know – and accept – that laws are often ambiguous or vague and that they have to be interpreted. And that the interpretation of the law can differ from judge to judge, even though case law and scholarship have devised standards of interpretation.

This opens up the possibility of criticising a judge's interpretation of the law. What is it that makes his or her interpretation more than just another subjective opinion?

My answer is that a judge is appointed or elected to exercise an essential function of the state. He represents the third branch of government. In exercising his mandate he acts as a craftsman: a craftsman with no political programme to follow in his or her work.

Judges have no manifesto. That is in fact essential to their work. They are constantly on their guard against bias, preconceived notions and opinions that appear self-evident. They try to understand and allow consideration of new and unexpected arguments presented to them. In brief, they both want and are compelled to adopt a fresh, unbiased attitude every day. Any judge who claimed to perform his duties on the basis of social democratic, liberal or religious convictions would be failing to understand and indeed undermining his position.

The judge's task is to give an unbiased and independent judgment in specific cases. He endeavours to get to the bottom of the facts presented to him just as a carpenter measures, saws, fits and tightens the screws. A judge listens, reads, tries to appreciate the full impact of the arguments adduced, and asks whether there could be any other arguments. And then he reaches a decision, with all due respect for the arguments advanced.

Of course this is not a robotic process. It would be foolish to think that the personality of the judge does not play a role in his work. In this connection let me repeat the words of Albie Sachs, formerly a justice of the Constitutional Court of South Africa. Reflecting on how one's life experiences play a part in judging, he says:

'our task is not simply to try to solve problems through formal legal reasoning. Nor, on the other hand, is it to wrap up purely personal preferences in legal vocabulary. Our judicial function has been to identify issues, to weigh the different considerations involved, to arrive at a proportionately balanced outcome that took account of the context and the constitutional values at stake and to share with the public all the reasoning that led to the final product. In a word, it is to judge.'

IV. Human Rights in practice

So, we have the rule of law, we have human rights, we have independent judges and we have cases, real cases about real people that have to be decided. Now let us look in more detail at how these all come together in practice.

In the field of human rights one of the most important tools for any judge in today's Europe is the European Convention on Human Rights. This is especially true of the Netherlands. Our Constitution does not allow the courts to review the constitutionality of Acts of Parliament but obliges them to review the application of national legislation in the light of international treaties. The Constitution therefore plays a fairly inactive role in the courts. However, the opposite is the case with the European Convention on Human Rights. In the courts, the effect of human rights is most strongly felt through the application of the Convention.

Over the last 30 years, the Convention and the case law of the European Court of Human Rights have come to be highly significant in virtually all areas of law. In the absence of constitutional review in the strict sense, it is vital that the Dutch courts are obliged to review legislation in the light of treaties. The rule of law would be seriously flawed without that obligation.

IV.1. Five developments

A symposium that I recently attended at Radboud University Nijmegen discussed four developments which may explain the great increase in the importance of fundamental rights in recent years. Proliferation, socialisation, horizontal effect and internationalisation. I would add a fifth, namely a broadening of perspective.

IV.1.1. Proliferation

First, the proliferation of fundamental rights. This means that more and more elements of the law are being brought within the category of fundamental rights. This development lies behind most of the criticism levelled at the judgments of the European Court of Human Rights. The critics say that the Court's interpretation of the Convention stretches the scope of its provisions too far. In this way the Court is said to be forcing the states parties in a direction that is inappropriate for them. I shall discuss this point in more detail shortly. It touches on major themes, areas of tension and interesting questions such as imposing uniformity in the administration of justice as opposed to allowing scope for a national approach, which is given substance in the Court of Human Rights' case law, for example through the doctrine of the margin of appreciation.

Another theme that arises here is the difference between destructive and constructive criticism. On 25 January 2012 the British Prime Minister, David Cameron, gave a speech to the Council of Europe, referring among other things to the Court's case law on prisoner voting rights. He said:

'it has felt to us in national governments that the "margin of appreciation" – which allows for different interpretations of the Convention – has shrunk ... and that not enough account is being taken of democratic decisions by national parliaments. (...) As the margin of appreciation has shrunk, so controversy has grown. (...) for too many people, the very concept of rights is in danger of slipping from something noble to something discredited (...) when controversial rulings overshadow the good and patient long-term work that has been done, ... it has a corrosive effect on people's support for human rights.'

I'll come back to these points shortly. But first let me address the other developments.

IV.1.2. Socialisation

The second development that accounts for the fact that human rights have become so deeply rooted in almost all fields of law is socialisation. This refers to the blurring of the distinction between fundamental social rights and 'classic' fundamental rights.

For example, the European Court of Human Rights has held that states are under a positive obligation to guarantee a minimum standard of living, as a way of preventing breaches of the ban on inhuman or degrading treatment. And in certain specific cases protection against serious environmental harm has been described as falling under the human right to respect for private life.

In fact this development could also be seen as a form of proliferation of fundamental rights, though only in a particular area.

IV.1.3. Horizontal effect

The same is true to a certain extent of the third development: horizontal effect. This means that fundamental rights no longer provide protection only against the state but are also invoked in relationships between individuals and between enterprises. The notion that enterprises too have an obligation to respect fundamental rights has also arisen in this context.

IV.1.4. Internationalisation

Internationalisation is the fourth development I should like to discuss. In addition to the fundamental rights enshrined in national constitutions, we now have many international sources of rights. Over the next few years attention will be focused on the Charter of Fundamental Rights of the European Union and on the EU's accession to the treaty mechanism of the ECHR.

IV.1.5. A broadening of perspective

I would like to add a fifth development, namely a broadening of perspective. This in turn cannot be viewed in isolation from the other four. This development means that nowadays legal protection means more than just protection from the state, a view in the 1970s that was quite firmly rooted in the Netherlands, particularly in the field of criminal law. Since then we have come to realise that legal protection also means the protection of society as a whole, especially the protection of victims. Tension can sometimes arise between these two views.

In this context I would like to draw attention to the positive obligations to introduce effective criminal law measures that have been developed in European Court of Human Rights case law. The Court has ruled that state parties are obliged to use effective criminal law means to tackle grave breaches of the rights guaranteed by the Convention.

For example, the right to life enshrined in article 2 means that states parties are under an obligation to take appropriate measures to protect the lives of those within their jurisdiction. From this stems a primary obligation 'to secure the right to life by putting 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'. This obligation implies that national criminal law must include provisions criminalising acts constituting breaches of the relevant Convention provisions. In addition, there must be no structural impediments in place to undermine the effectiveness of the criminal law provisions.

Needless to say, not only must the national law of the States parties to the ECHR provide on paper for a structure allowing effective action under criminal law, but this structure must also be applied in practice. The European Court of Human Rights ensures that this is done by obliging state parties to conduct careful and impartial investigations into grave breaches of Convention rights, investigations that should be capable of leading to the prosecution and punishment of those responsible.

The Court also examines sentencing. The sentence handed down may not undermine the criminal law's deterrent effect; an unusually lenient sentence must therefore be supported by appropriate arguments.

From the point of view of the victim it is unacceptable for the perpetrator not to be tried in a way that acknowledges the severity of his offence. In a state governed by the rule of law, the Court's case law on positive obligations implies that the law must offer protection not only against violations of fundamental rights by the state but also against violations committed by individuals. The degree to which the rule of law exists in a country is determined by more than the protection afforded by the law to the accused.

All of these developments have contributed to the fact that ensuring the observance of human rights has become an important part of the day-to-day routine of any judge in the Netherlands which, of course, is a good thing.

V. Scope for a national approach: dilemma and criticism

I should like to devote the last part of my lecture to the two related subjects that I mentioned earlier under the heading of 'proliferation':

- a. scope for a national approach versus European uniformity and
- b. the difference between destructive and constructive criticism of European Court of Human Rights case law.

V.1. European Court and national courts: a cooperative relationship based on mutual respect

Courts have an important responsibility in ensuring the observance of human rights. In a sense, the challenge for the national court of first instance is the same as for one of Europe's highest courts: to ensure that human rights do not only exist on paper but that they are 'practical and effective'.

However, the pyramidal structure of the judicial system gives these different courts different roles. The higher courts have a greater responsibility for the interpretation of human rights that are laid down in the ECHR, the EU Charter of Fundamental Rights and national legislation. Via their binding interpretation of such legal provisions these courts can influence the practical significance of human rights. In the lower courts, the emphasis is on ensuring respect for human rights in the many individual cases that these courts handle.

The highest national courts, such as the Supreme Court of the Netherlands, have a middle position: they translate the case law of the highest European courts and clarify its precise meaning for the national legal order.

The often vague wording of the provisions in the ECHR and the EU Charter of Fundamental Rights needs to be interpreted in specific cases. The possibility of applying these provisions to new and unforeseen situations through judicial interpretation gives these instruments a lasting value. This is why they are 'living instruments', in contrast to what Justice Scalia says about the American Constitution. He says: 'It's not a living document it's dead, dead, dead'.

That the ECHR should be treated as a living instrument was confirmed by the state parties quite recently. The Court thus rightly sees it as its task to interpret the Convention in the light of present-day conditions.

When interpreting human rights as they are laid down in the European Convention on Human Rights it is ultimately the highest court which has to develop a standard of review, a test that reflects the result of balancing such competing interests. In the US, a standard of review in which all the particular circumstances of the case may be taken into account is called a 'totality-of-the-circumstances test'. In contrast, there is a standard of review which takes the form of a 'bright-line rule': a clear rule that allows the court to take only a few factors into account.

There are pros and cons to both kinds of tests. The strength of a totality-of-the-circumstances test is that in each case a just outcome can be achieved with great precision. Therein simultaneously lies the weakness: the outcome is often less predictable than if a bright-line rule were used.

Simplicity, certainty and legal uniformity are served by a bright-line rule. But in individual cases a bright-line rule leaves less room to take the circumstances of the case into account and to reach an outcome that minimises infringement on the underlying competing interests. The most powerful way for the courts at the top of the judicial pyramid to assert their influence consists of adopting a bright-line rule coupled with a drastic remedy for violation of the rule in question.

A totality-of-the-circumstances test gives the lower courts more latitude to find an equitable solution in individual cases, but also provides scope to escape the outcomes desired by the highest courts: in other words, such a test exerts less discipline. The desire to keep the law manageable can serve as a strong argument in choosing a bright line rule as a standard of review.

We as European judges have to deal with a plurality of sources of fundamental rights in national and supranational law. The *ne bis in idem* principle is a good example. It is reflected in many supranational and national provisions, provisions that deal with different situations and often have a different scope. At first sight case law that fosters clarity and legal uniformity seems highly desirable. The *ne bis in idem* principle involves on the one hand the interest of the accused in not being prosecuted repeatedly for the same offence and on the other, a substantial interest of society in the prosecution of a related offence, or even in a repeat prosecution. Stronger protection for accused persons against being prosecuted twice for the same offence means weaker protection for victims and for society.

Regarding the *ne bis in idem* principle, the highest European courts opted for a bright-line rule. This serves both legal uniformity and clarity, but in my view national courts should not be allowed to become too limited in reaching just outcomes in individual cases. A strict application of this bright-line rule may be acceptable in cases in which the only interests at stake are those of the government and the defendant. But when it comes to cases involving victims of serious offences, it seems to me that there should be sufficient room to take their interests into account as well. In this connection the ECtHR case law on positive obligations for the effective criminalisation of offences that infringe on fundamental rights is inspiring and important.

Keeping the law manageable is undoubtedly one of the major challenges for national and supranational high courts. But an even bigger challenge in my eyes is to make sure that, in the growing complexity of the law, we do not lose sight of what matters in the end: the administration of justice.

‘My role as judge is to bridge the gap between law and society.’

That is how the former President of the Supreme Court of Israel Aharon Barak once summarised our task as judges. This means in my view that the court in individual cases must weigh the interests involved and reach a just solution. Legal rules as interpreted by the courts must facilitate reaching such a just solution.

Similar remarks can be made on the right to legal assistance during police questioning. The case law of the ECtHR on this subject used to leave room for differing approaches in national law. But in 2008 in the *Salduz* judgment the Court adopted a stricter interpretation that the accused should be able to consult a lawyer before being questioned by the police. Violation of this rule had to result in the evidence being excluded.

This change of course heavily influenced the practice of police questioning in many member states, as the 1966 *Miranda* case did in the U.S. In the Netherlands, for example, the test of whether the testimony of an accused can be used as evidence changed from a substantive test of whether he made his statement voluntarily in the circumstances of the case into a formal test as to whether the *Salduz*

rule was observed. This means in some cases that a statement made voluntarily by the defendant, without which a serious offence cannot be proved, cannot be used on formal grounds.

In 1966 the Miranda judgment had the same effect in the US. But that was at a time when segregation still existed in the United States, police were mainly white men and defendants often Afro-Americans. In its reasoning in support of the then new approach, the United States Supreme Court pointed out that in several states the practice of police questioning was incompatible with the rights of the accused. In some cases a less satisfactory outcome was accepted in the interests of improving police practice across the board.

I believe that reasoning could very well have been convincing in the America of 1966. When the ECtHR prescribed a similar approach in 2008 in the Salduz case, it was less clear that this was required by the manner in which police questioning was carried out in the state parties and that existing legal safeguards in most countries were not sufficient.

This presents the highest European courts with a serious dilemma in the interpretation of human rights. The differences between the legal systems and the observance of human rights in practice in these courts' jurisdictions are considerable. So in one jurisdiction strict rule and severe remedies may be highly appropriate to foster respect for human rights while in another, where human rights are protected by adequate guarantees, it would seem unjustifiable to accept the disadvantages that go with such an approach.

The countries where protection for human rights is already firmly rooted should sympathise with this dilemma. To complain indiscriminately about case law or even to delay implementing judgments handed down by the highest European courts plays into the hands of jurisdictions where human rights are less respected and undermines the protection that the ECHR is meant to give to people falling within the jurisdiction of Council of Europe member states.

Think about it. What signal does a prime minister send to the leader of a country where, for example, the rights of gay people are severely oppressed if he/she argues, after an unpopular judgment, that the European Court of Human Rights systematically exceeds its competence and allows the states parties too narrow a margin of appreciation?

This brings me to the last point I should like to raise.

V.2. The difference between destructive and constructive criticism

Citizens are naturally more willing to support institutions they understand and trust. If members of the public do not really understand what is meant by independent courts, or if they lose trust in them, measures that undermine the rule of law can begin to gain support. Simplistic and unfounded criticisms of the administration of justice can encourage acceptance of steps to limit the role of the courts.

Ensuring that there is understanding and support for the rule of law demands unceasing efforts. Not only from the judiciary, but from the legislature and executive too. Their representatives bear a heavy, shared responsibility. If the rule of law is to remain viable, its significance and our enthusiasm in its cause must be passed on from generation to generation.

'Liberty,' wrote the eminent American judge Billings Learned Hand, 'lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it.'

Comments from representatives of the three branches of government must not undermine public confidence in the institutions of the state. They all therefore bear a responsibility to express themselves in a moderate fashion even when responding to incidents. 'Following the law is,' to repeat the words of Justice Breyer that I quoted earlier, 'a matter of widely shared understandings as to how those in

government and members of the public should (...) act when faced with a court decision they strongly dislike’.

This does not mean that no criticism of the judiciary may be expressed: we are open to critical comment. In fact, the whole system of appeal and cassation is based on an awareness of the fallibility of judges. Criticism keeps us on our toes, but in public debate that criticism should be expressed with a greater understanding of our position. Untimely or thoughtless criticism damages the judiciary and can disturb the balance of power within the state.

A conference of the ministers of the 47 state parties of the Council of Europe was held in Brighton in 2012 which focused among other things on the problem of the workload of the European Court of Human Rights. The declaration issued at the end of the conference acknowledged the extraordinary contribution made by the Court to the protection of human rights in Europe over the past 50 years.

That is important, as the Court’s president, Sir Nicholas Bratza, pointed out in his speech to the conference ‘at a time when human rights and the Convention are increasingly held responsible in certain quarters for much that is wrong in society (...) We should not lose sight of what that system is intended to do, that is to monitor compliance with the minimum standards necessary for a democratic society operating within the rule of law; (...) It is no ordinary treaty. (...) It sets out rights and freedoms that are binding on the Contracting Parties.’

Judicial independence is crucial here. Presumably in response to the various places in the declaration where the Court is ‘invited’ to shape its case law in a particular way or where case law tending in a particular direction is ‘welcomed’, President Bratza indicated that he was ‘uncomfortable with the idea that Governments can in some way dictate to the Court how its case-law should evolve’.

The governments of the state parties should be extremely restrained in this respect, even if they – and perhaps public opinion – have a problem with certain judgments. It is worrying that just when the Court needs all the support it can get, a public debate is under way that connects the caseload with what some people regard as too broad an interpretation of some of the rights enshrined in the Convention. Of course, the latter issue should be debated too. But the two issues should not be conflated. If they are, people soon get the impression that the excessive caseload is the Court’s own fault.

A government’s willingness to help solve the caseload problem must never depend on any undertaking by the Court to interpret the Convention to that government’s liking. If there is one area where the saying ‘he who pays the piper calls the tune’ can never apply, either in theory or in practice, it is in the administration of justice. In that sense Montesquieu’s doctrine of the separation of powers is not one jot out of date.

The relationship between the European Court of Human Rights and national courts is by no means a one-way street. Former President of the Dutch Supreme Court Siep Martens, who had also been a judge on the European Court, called it a cooperative relationship. In other words, national courts are required to follow European Court judgments loyally but not slavishly.

To return to the two examples I mentioned earlier: the Dutch Supreme Court implemented the *Salduz* judgment swiftly and loyally. And it handed down a judgment on the *ne bis in idem* principle which might be regarded as exploring the scope left by the bright-line rules of European case law in order to facilitate a just outcome in specific cases. This may prompt a constructive debate.

VI. Conclusion

Human rights are very much alive in Europe. Or to put it a better way, with a nod to Justice Scalia, they are alive, alive, alive! And this is partly owing to the fact that courts are prepared to interpret human rights in the light of present-day conditions.

The ECHR, with its right of individual petition, is one of the main bulwarks of a Europe where human rights are genuinely respected. Currently, 47 countries are party to the Convention and nearly 820 million people enjoy its protection, in a territory stretching from Cyprus to the North Pole and from western Greenland to easternmost Russia. When considering the impact of the ECHR and the case law of the Court, we must not become fixated on issues that we are less than happy about. We must never lose sight of how valuable the Convention and its various enforcement mechanisms are to the whole of Europe.

Nowadays, any government of a member state of the Council of Europe has to explain itself if it fails to take sufficient account of human rights. I am referring, for example, to developments in Russia, where homosexuality is still regarded as wrong, and to developments in countries like Hungary and Slovakia. Sadly, these are not the only examples. Minorities are not alone in the fight to have their human rights respected. They know that they have the law on their side. And that is good news, not only for the minorities caught up in a struggle for freedom, but for us all. It is the defining feature of our civilisation.

The rule of law is something we have to work hard to achieve, but it is worth every effort: from politicians, from the executive branch, from the courts, but also for the practice-oriented teachers and researchers here at the European University Institute.

The rule of law is not a luxury, it's a necessity.

Thank you for your attention.

