

The European Court of Human Rights in action

Luzius WILDHABER *

The principal and overriding aim of the system set up by the European Convention on Human Rights is to bring about a situation in which in each and every Contracting State the rights and freedoms are effectively protected. That means primarily that the relevant structures and procedures are in place to allow individual citizens to vindicate those rights and to assert those freedoms in the national courts.

As the European Court of Human Rights has recently emphasised, “the object and purpose underlying the Convention, as set out in Article 1, is that the rights and freedoms should be secured by the Contracting State within its jurisdiction. It is fundamental to the machinery of protection established by the Convention that the national systems themselves provide redress for breaches of its provisions, the Court exerting its supervisory role subject to the principle of subsidiarity”.¹⁾ This was confirmed in the context of Article 13 (which requires Contracting States to provide an effective remedy for violations of the Convention). The Court held that the obligation to provide a remedy extended also to problems of length of proceedings in breach of Article 6. As the Court noted: “the [exhaustion of domestic remedies] rule in Article 35 § 1 is based on the assumption, reflected in Article 13 (with which it has a close affinity), that there is an effective domestic remedy available in respect of the alleged breach of an individual’s Convention rights. In that way, Article 13, giving direct expression to the States’ obligation to protect human rights first and foremost within their own legal system, establishes an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights. The object of Article 13, as emerges from the *travaux préparatoires*,²⁾ is to provide a means whereby individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court”.³⁾

That then is the framework for the Court’s judicial activity. I should like now to

* President of the European Court of Human Rights, Professor (Basel), Dr. iur., LL. M., J. S. D., Dres. h. c., LL. D. h. c.

1) *Z. and Others v. the United Kingdom*, 10.5.2001, ECHR 2001-V, § 103.

2) See the Collected Edition of the “*Travaux Préparatoires*” of the European Convention on Human Rights, vol. II, pp. 485 and 490, and vol. III, p. 651.

3) *Kudła v. Poland*, 26.10.2000, ECHR 2000-XI, § 152.

consider some recent cases under three headings: evolutive interpretation, separation of powers and human dignity. If these themes provide only a glimpse of the Court's work last year, they are each fundamental to the effectiveness of the Convention system and the Court's authority.

On the question of evolutive interpretation, it is precisely the genius of the Convention that it is indeed a dynamic and a living instrument. It has shown a capacity to evolve in the light of social and technological developments that its drafters, however far-sighted, could never have imagined. The Convention has shown that it is capable of growing with society; and in this respect its formulations have proved their worth over five decades. It has remained a live and modern instrument. The "living instrument" doctrine is one of the best known principles of Strasbourg case-law. It expresses the principle that the Convention is interpreted "in the light of present day conditions", that it evolves through the interpretation of the Court.

This principle of dynamic interpretation was first enounced in relation to corporal punishment following criminal proceedings.⁴⁾ But it has received its most frequent expression in relation to Article 8. This is hardly surprising not only because of the breadth of the interests covered by Article 8, that is private and family life, correspondence and home, but also because it is precisely those interests which are most likely to be affected by changes in society. In a dynamic instrument, Article 8 has proved to be the most elastic provision. Thus it has embraced such matters as the taking of children into care, nuisance caused by a waste treatment plant, planning issues, aircraft noise, transsexuals' rights, corporal punishment in schools, access to confidential documents relating to an applicant's past in the care of the public authorities, the choice of a child's first name, application of immigration rules, disclosure of medical records and I could go on and on; the list is a long one.

The breadth of the potential scope of the interests protected by Article 8 has thus been an advantage in allowing the development of the Court's case-law in this area to keep pace with the modern world. It is, however, something of a disadvantage when Governments are seeking to establish exactly what is expected of them under the Convention. This is all the more so, because in one of its earliest judgments concerning Article 8,⁵⁾ the Court made it clear that in addition to the obligation to abstain from arbitrary interference with the protected interests, the State authorities could be under a positive obligation to ensure effective "respect" for those interests. That case concerned the status of a child born out of wedlock. The Court noted that respect for family life implied in particular "the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his [or her] family".⁶⁾ Moreover, such

4) *Tyrer v. the United Kingdom*, 25.4.1978, Series A no. 26, § 31

5) *Marckx v. Belgium*, 13.6.1979, Series A no. 31.

6) *Ibid.* § 31.

positive obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.⁷⁾

A line of cases on transsexuals' rights is interesting in that these decisions shed light on the evolutive process of interpretation of the Convention. The essence of the applicants' complaints has been that the respondent States in question have failed to take positive steps to modify a system which operates to their detriment, the system being that of birth registration. The Court carried out its usual exercise of seeking a fair balance between the general interest and the interests of the individual. It had until last year, by a small and dwindling majority and with one exception distinguished on the facts,⁸⁾ found that there was no positive obligation for the respondent State to modify its system of birth registration so as to have the register of births updated or annotated to record changed sexual identity.⁹⁾

However, the Court never closed the door on the possibility of requiring legal recognition of new sexual identity.¹⁰⁾ It reiterated the need for Contracting States to keep the question under review. In the case of *Sheffield and Horsham*, decided in 1998, it acknowledged the increased social acceptance of transsexualism and increased recognition of the problems which post-operative transsexuals encounter. In order to determine whether it should revise its case-law, the Court looked at two aspects: scientific developments and legal developments. As to scientific developments, it confirmed its view that there remained uncertainty as to the essential nature of transsexualism and observed that the legitimacy of surgical intervention was sometimes questioned. There had not been any findings in the area of medical science which settled conclusively the doubts concerning the causes of the condition of transsexualism. The non-acceptance by the respondent State of the sex of the brain as being the crucial determinant of gender could not be criticised as unreasonable.¹¹⁾

Looking at the legal development, the Court examined the comparative study that had been submitted by a human rights organisation. It was not satisfied that this established the existence of any common European approach to the problems created by the recognition in law of post-operative gender status. In particular there was no common approach as to how to address the repercussions which such recognition might entail for other areas of law such as marriage, filiation, privacy or data protection.

In the case of *Goodwin* decided last year however, the Court finally reached the conclusion that the fair balance now tilted in favour of legal recognition of transsexuals.¹²⁾

7) *X and Y v the Netherlands*, 26.3.2000, Series A no. 91, § 23.

8) *B v. France*, 25.3.1992, Series A no 232-C.

9) *Rees v. United Kingdom*, 17.10.1986, Series A no. 106 ; *Cossey v. the United Kingdom*, 27.9.1990, Series A no. 184 ; *Sheffield and Horsham v. the United Kingdom*, 30.7.1998, Reports 1998-V.

10) See dissenting opinion of Judge van Dijk in *Sheffield and Horsham*, supra n. 9.

11) *Sheffield and Horsham*, supra n. 9, § 55.

12) *Goodwin v. United Kingdom*, 11.7.2002.

It recalled that it had to have regard to the changing conditions within the respondent State and within Contracting States generally and to respond to any evolving convergence as to standards to be achieved. A failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement. In this case the Court attached less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed by transsexualism. Rather it stressed the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals, but of legal recognition of the new sexual identity of post-operative transsexuals. No concrete or substantial hardship or detriment to the public interest had been demonstrated as likely to flow from the changes to the status of transsexuals. Society could reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with sexual identity chosen by them at great personal cost. In other words, the individual interest asserted did not impose an excessive burden on the community as a whole.

The Court is understandably wary of extending its case-law on positive obligations. It has first to be convinced not only that there has been a clear evolution of morals, but that this evolution, where appropriate substantiated by an accompanying evolution of scientific knowledge, is reflected in the law and practice of a majority of the Contracting States. The Court will then interpret the terms of the Convention in the light of that evolution. It is not, I would say, the Court's role to engineer changes in society or to impose moral choices.

Another, rather different example, of the living instrument approach can be seen in the case of *Stafford v. the United Kingdom* also decided last year.¹³⁾ There the Court revisited its earlier finding that mandatory life sentences for murder in the UK constituted punishment for life and therefore that re-detention after release on licence could be justified on the basis of the original conviction and need not be the subject of new judicial proceedings. The Court took judicial notice of the evolving position of the British courts as to the nature of life sentences in an interesting example of a two-way process. In this process developments in the domestic legal system influence Strasbourg to change its case-law, which in turn results in the consolidation of the evolution at national level, what one might call jurisprudential osmosis.

The applicant Stafford had been convicted of murder and released on licence after completing the punitive element or tariff of his sentence. He was subsequently convicted and sentenced for an unconnected, non-violent offence. His continued detention after completing the second sentence under the first mandatory life sentence was found to be in breach of Article 5 § 1 of the Convention. Admittedly the Court found that there was no

13) *Stafford v. the United Kingdom*, 28.5.2002, ECHR 2002-IV.

material distinction on the facts between Stafford and the earlier case.¹⁴⁾ However, having regard to the significant developments in the domestic sphere, it proposed to re-assess “in the light of present-day conditions” what was now the appropriate interpretation and application of the Convention. This was necessary to render the Convention rights practical and effective, not theoretical and illusory. Thus the Court had regard to the changing conditions and any emerging consensus discernible within the domestic legal order of the respondent Contracting State. It found that there was not a sufficient causal connection between the applicant’s continued detention and his original sentence for murder. The Court also held that there had been a breach of Article 5 § 4 in that the power of decision concerning the applicant’s release lay with a member of the executive, the Home Secretary, who could reject the parole board’s recommendation. In other words the lawfulness of the applicant’s continued detention was not reviewed by a body with a power to order his release or with a procedure containing the necessary judicial safeguards.

The Court thus drew attention to another issue raised by the Stafford case. This was the separation of powers and the difficulty of reconciling the power of a member of the executive to fix the punitive element of a prison sentence and to decide on a prisoner’s release with that notion, which had assumed a growing importance in the Strasbourg case-law. In another British case, concerning the release of persons detained in a mental hospital,¹⁵⁾ the power to order release lay with the Secretary of State. The decision to release would therefore be taken by a member of the executive and not by the competent tribunal. This was not a matter of form but impinged on the fundamental principle of separation of powers and detracted from a necessary guarantee against the possibility of abuse.

The separation of powers is a crucial element in the Convention system as one of the fundamental pillars of the rule of law. At the same time it is a principle which has also to apply, admittedly in a rather different way, to the functioning of the Strasbourg Court. There is no room for even the perception of external interference or of any lack of independence of the Court. In this respect it has to be recognised that there are still unresolved questions about the Court’s status and its true position within the Council of Europe architecture. I should also say that we in Strasbourg have ourselves on occasion had to remind Governments of the special character of the Court’s judicial function, which should command the same respect owed to a national judiciary.

The question not so much of the formal separation of powers but more specifically the practical independence of the judiciary has also arisen in other circumstances. Last year the Court found a violation of the fair trial guarantee in the Ukrainian case of *Sovtransavto* in which there had been in the domestic proceedings numerous interventions by the

14) *Wynne v. the United Kingdom*, 18.7.1994, Series A no. 294-A.

15) *Benjamin and Wilson v. the United Kingdom*, 26.9.2002.

Ukrainian authorities at the highest political level. Such interventions disclosed a lack of respect for the very function of the judiciary.¹⁶⁾

My third theme is a recurring one in the Court's case-law, namely the notion of human dignity which lies at the heart of the Convention. Thus, the Court held last year that a State must ensure that a person is imprisoned in conditions which are compatible with respect for his human dignity. The manner and execution of the measure should not subject him to distress and hardship of an intensity exceeding the unavoidable level of suffering inherent in detention. In the case of *Kalashnikov v. Russia* the Court found that at any given time the overcrowding was such that each inmate in the applicant's cell had between 0.9 and 1.9 square metres of space ; that the inmates in the applicant's cell had to sleep taking turns, on the basis of eight-hour shifts ; that the cell was infested with pests ; that the toilet facilities in the cell were filthy and dilapidated with no privacy ; and that some prison inmates suffered from contagious diseases. The absence of any positive intention to humiliate or debase the detainee, although a factor to be taken into account, could not exclude a finding of inhuman and degrading treatment and thus of a violation of Article 3 of the Convention.¹⁷⁾

Human dignity was at issue in other contexts in 2002. Early in the year the Court had a particularly poignant case to decide called *Pretty*.¹⁸⁾ The applicant was a British national in the terminal stages of motor neurone disease. She had unsuccessfully sought an undertaking from the Director of Public Prosecutions that her husband would not be criminally prosecuted if he assisted her to commit suicide. The applicant claimed that this refusal infringed, among other things, her right to life under Article 2 of the Convention, the prohibition of inhuman or degrading treatment under Article 3 and the right to respect for private life under Article 8.

The Court looked primarily at the plain meaning of the Convention terms. Thus it could not read into the "the right to life" guaranteed in Article 2 a right to die. Nor could the notion of inhuman and degrading treatment prohibited under Article 3 of the Convention be extended to cover the refusal to give the undertaking which the applicant sought. The positive obligation on the part of the State which was invoked would require that the State sanction actions intended to terminate life, an obligation that could not be derived from Article 3 of the Convention.

The Court nevertheless reiterated, in its consideration of the complaint under Article 8, that the very essence of the Convention was respect for human dignity and human freedom. Without negating the principle of sanctity of life protected under the Convention, it was under Article 8 that notions of the quality of life took on significance. In an era of growing medical sophistication combined with longer life expectancy, many

16) *Sovtransavto v. Ukraine*, 25.7.2002.

17) *Kalashnikov v. Russia*, 15.7.2002.

18) *Pretty v. United Kingdom*, 29.7.2002.

people were concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflicted with strongly held ideas of self and personal identity. The circumstances of the case could therefore give rise to an interference with the right to respect for private life.

This meant that under the second paragraph of Article 8 the Court had to determine the necessity of such interference. It found that States were entitled to regulate through the operation of the general criminal law activities which were detrimental to the life and safety of other individuals. The law in issue was designed to safeguard life by protecting the weak and vulnerable and especially those who were not in a condition to take informed decisions against acts intended to end life or to assist in ending life. It was primarily for each State to assess the risk and the likely incidence of abuse within its society if the general prohibition on assisted suicides were relaxed or if exceptions were to be created. The contested measure came within the spectrum of those that could be considered "necessary in a democratic society".

This sensitive and difficult case provides a further example of the Court's cautious approach to the living instrument doctrine in areas which are still the matter of intense legal, moral and scientific debate. Moreover, it reminds us that there are areas of action within which States should retain a degree of discretion both as the local authorities best placed to carry out certain assessments and also in accordance with the principles of a democratic society.

The main challenge facing the Court is now its ever-growing case-load.¹⁹⁾ The Court has currently some 32,000 applications pending before its decision bodies. Applications have increased by around 140% since the present Court took office in November 1998, by about 1,500% since 1988. The potential for growth is almost unlimited as a result of the massive expansion of the Council of Europe over the last decade. Moreover, the evolution of case-load is not merely quantitative. The nature of the cases coming before the Court inevitably reflects the changed composition of the Council of Europe, with a significant number of States which are still in many respects, and particularly with regard to their judicial systems, in transition, even if considerable progress has been made in several of them. In such States there are likely to be structural problems, which cannot be resolved overnight. The understandable political imperatives of the heady days post 1989 have, it must be said, left the Court with a major headache, just because it is a Court and must decide issues of law, without reference to political expediency.

I am convinced that, only just four and a half years after the radical reform of the Convention mechanism implemented by Protocol No. 11, replacing the two original institutions by a single judicial body, the system is in further need of a major overhaul.

19) See Luzius Wildhaber, A constitutional future for the European Court of Human Rights?, *Human Rights Law Journal* 23 (2002) 161-165.

That is why we should now be looking for a mechanism not only for the expeditious and cheap disposal of applications which do not satisfy the admissibility requirements. Such mechanism should also relieve the Court of routine, manifestly well-founded cases and indeed beyond that cases which do not raise an issue in the sense that the issue of principle has already been resolved. The obligation for a respondent State arising from a finding of a violation of the Convention is the elimination of the causes of the violation to prevent its repetition. Therefore subsequent applications whose complaint derives from the same circumstances should be seen as problem of execution. This is particularly true of violations of a "structural" nature.²⁰⁾ Once the Court has established the existence of a structural violation or an administrative practice, is the general purpose of raising the level of human rights protection in the State concerned really served by continuing to issue judgments establishing the same violation? Here we see the conflict between general interest and individual justice at its clearest. If individual justice is the primary objective of the Convention system, then of course in the situation described the Court must continue to give judgments so as to be able to award compensation to the individual victim. Yet if we look at the scheme for just satisfaction set up by the Convention under Article 41, we can see that it hardly supports the individual justice theory. To begin with it is discretionary as the Court is to award satisfaction "if necessary". The Court's case-law shows that it is indeed not the automatic consequence of a finding of violation. Hence the Court's well-established practice of holding in appropriate cases that a finding of a violation is in itself sufficient just satisfaction.²¹⁾ This is surely also an indication of the "public-policy" nature of the system.

But let us take a concrete example. The Court found, as I have said, a violation of Article 3 prohibiting inhuman and degrading treatment in respect of prison conditions in Russia.²²⁾ The evidence adduced by the Government itself indicated that this was a widespread situation throughout the State concerned. It has to be asked whether there would be a great deal of sense in the Court's processing the potentially tens of thousands of applications brought by detainees in similar conditions? Would the award of the no doubt quite substantial compensation on an individual basis, always supposing that the Court was able to deal with the cases concerned, hasten the resolution of the problem, contribute to the elimination of the causes of the original violation? Very probably not and particularly if it is considered that one of the causes may well be a lack of funding. At the same time it would undermine the credibility of the Court for it to continue to issue findings of violations with no apparent effect. The inflow of thousands of same-issue-cases would clog up the system almost irremediably. This might lead to judgments delivered five

20) See *Botazzi v. Italy*, 28.7.1999, ECHR 1999-V.

21) The first time this formula was used was in *Golder v. United Kingdom*, 21.2.1975, Series A no. 1975. It was recently confirmed in *Kingsley v. United Kingdom*, 28.5.2002.

22) *Kalashnikov v. Russia*, supra n. 17.

or more years after the lodging of the application. Not only is this sort of delay hardly acceptable, it also complicates the execution process because Governments can claim that the situation represented in the judgment no longer reflects the reality. I cite prison conditions, but the same problem could, indeed undoubtedly will, arise in relation to structural dysfunction in the operation of legal systems in some contracting States. We had already a foretaste of this with length of proceedings in Italy. We now realise that about half the Contracting States have problems with the length of judicial proceedings. We also know that there are in many of them grave difficulties with regard to the non-execution of final and binding judicial decisions.

It follows that this type of problem should be regarded as part of the process of execution. But that process should not be solely "condemnatory". Once a structural problem has been identified, if the Governments are serious about raising the standard of human rights throughout Europe, then they must ensure that the Council of Europe is in a position to assist the State concerned to resolve it, in particular by providing expert advice, judicial or police training schemes. In other words I believe that we need to look again not just at the way the Court operates, but at the whole Convention system, and particularly the approach to execution. The emphasis should be not only on the pressure to be exerted on the respondent State, but also where appropriate on the necessary assistance to deal with the problem raised by the judgment.

It therefore seems to me that the way forward is to make it possible for the Court to concentrate its efforts on decisions of "principle", decisions which create jurisprudence. This would also be the best means of ensuring that the common minimum standards are maintained across Europe. The lowering of standards is often cited in European Union circles as a potential consequence of the enlargement of the Council of Europe. Examination of the cases decided over the last four years belies this fear. Yet there is a risk in the longer term, a risk that can be avoided if the Court adheres to a more "constitutional" role, as I have advocated.

Let me here again enter a caveat. What I am saying today does not necessarily represent the views of all my colleagues on the Court. I can also imagine that the Non Governmental Organisations, who are understandably greatly attached to the principle of individual relief, may oppose moves which may be thought to dilute the right of full access to the Court. Yet with many thousands of applications being brought annually the right of individual application will in practice be in any event endangered by the material impossibility of processing them in anything like a reasonable time. Will we really be able to claim that with say 35,000 cases a year, full, effective access can be guaranteed? Is it not better to take a more realistic approach to the problem and preserve the essence of the system, in conformity with its fundamental objective? The individual application would then be seen as a means to an end, rather than an end in itself, as the magnifying glass which reveals the imperfections in national legal systems, as the thermometer which tests

the democratic temperature of the States. Is it not better for there to be fewer judgments, but promptly delivered and extensively reasoned ones which establish the jurisprudential principles with a compelling clarity that will render them *de facto* binding *erga omnes*? At the same time they would reveal the structural problems which undermine democracy and the rule of law in parts of Europe.

This brings me back to my opening comment about the fundamental goal of the Convention system. That system will never provide an adequate substitute for effective human rights protection at national level; it has to be complementary to such protection. It should come into play where the national protection breaks down. But it cannot wholly replace national protection or even one area of national protection. Apart from anything else, although the Convention is about individuals, it is not only about the tiny proportion of individuals who bring their cases to Strasbourg (and it will never be more than a tiny proportion). As long as we remain too wedded to the idea of purely individual justice, we actually make it more difficult for the system to protect a greater number.

Let me finish by saying that these are perhaps difficult times for international law. The path towards establishing a credible and effective system of international justice will never be straight and easy. But when one considers the enormous progress achieved over the last fifty years, culminating in the process which led to the inauguration of the International Criminal Court earlier this year, I believe there is still room for optimism. I am privileged to preside over a Court which is perhaps the most successful emanation of international justice so far. It is important for the international community as a whole that it remains a model for a truly effective international system of human rights protection. That is why all those concerned must work toward ensuring that it can face up to the challenges of the new century.